Supreme Court, U.S.
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No. 04-702

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMICUS CURIAE BRIEF OF 271 UNITED KINGDOM AND EUROPEAN PARLIAMENTARIANS IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

This brief is submitted on behalf of a group of 271 United Kingdom and European parliamentarians, including 186 Members of the Houses of Parliament of the United Kingdom of Great Britain and Northern Ireland, 84 current or former Members of the European Parliament, and a Vice President of the European Commission (the "*amici*").[1] The full list of *amici* is attached as an Appendix to this brief.

Amici are drawn from all across Europe, both geographically and politically. The *amicus* group spans the political spectrum, and includes senior figures from all the major political parties in the United Kingdom, including former Cabinet Ministers. The group also includes five former judges of the highest court in the United Kingdom, senior lawyers, and eleven Bishops of the Church of England.

Amici filed a substantive brief in support of Mr Hamdan in the court below.[2] The brief examined the United States' obligations under international law and drew the District Court's attention to violations of international law inherent in the system of military commissions established to try detainees (including Mr Hamdan) at Guantanamo Bay. In particular, the brief noted that:

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party in this case authored the brief in whole or in part and no person or entity other than the *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] The full brief is available at http://www.law.georgetown.edu/faculty/nkk/documents/271europeanmembersofparliament.pdf.

(1) contrary to international law, the system of military commissions at Guantanamo Bay violates detainees' right to an impartial determination of their guilt or innocence;

(2) contrary to international law, the military commissions at Guantanamo Bay do not provide for appeal to an independent judicial body;

(3) contrary to international law, Mr Hamdan's right to a speedy trial has been violated;

(4) contrary to international law, the military commissions at Guantanamo Bay do not exclude evidence obtained by torture;

(5) contrary to international law, the military commissions at Guantanamo Bay discriminate against non-US citizens.

Amici filed the brief in the court below because, despite their divergent political views, they share a common view that it is important to the international legal order that the United States exemplify, even when faced with the threat of international terrorism, the highest standards of public international law and human rights law. *Amici* believe that it undermines the political and moral authority of the United States, and damages the rule of law in a troubled world, if the United States, contrary to its long tradition, fails to uphold standards that it has been so instrumental in creating. It is that same view that moves *amici* to file the present brief in support of Mr Hamdan's Petition for Writ of Certiorari Before Judgment (the "*Petition*").

SUMMARY OF ARGUMENT

Amici believe that the gravity of the issues involved, issues which concern all nations and most particularly those who share the commitment of the United States to the rule of law, and the need for speedy determination of the case to

prevent Mr Hamdan's continued detention without trial in violation of international law, require that the Petition be granted and the case be heard by this Court on an expedited basis, as explained below.

ARGUMENT

I. The Interests Of All Parties And The Wider World Are Served By An Expeditious And Definitive Resolution Of The Important Questions Presented In This Case.

Although *amici* appreciate that the procedure contemplated in the Petition is extraordinary, the circumstances of this case and the significance of the legal questions presented are also extraordinary, and undoubtedly warrant consideration at the earliest possible stage.

This is not a case in which the legal issues would benefit from the process of "percolating" through the Court of Appeals; further controversy is the last thing that is needed at this stage. Rather, what is needed is an authoritative determination of whether the military commission process that the Executive Branch has sought to implement at Guantanamo complies with the law, international and domestic, by which the Executive is bound.

Thus the case for certiorari before judgment is at least as strong, if not stronger, here than it was in *Ex parte Quirin*, 317 U.S. 1, 19 (1942), where this Court granted certiorari before judgment "[i]n view of the public importance of the questions raised...and because in [the Court's] opinion the public interest required that [the Court] consider and decide those questions without any avoidable delay."

A process similar to that employed in *Quirin* serves the interests not only of the parties in this case, but also of the wider community of nations committed to the rule of law. Mr Hamdan is of course crucially concerned with ensuring

the legitimacy of any process to which he will be subject, and, although the District Court's opinion only halted the proceedings against Mr Hamdan, surely the Government's interests are also served by having the numerous questions about the consistency of the military commission process with the United States' legal obligations authoritatively resolved as expeditiously as possible. (In fact, the Government has sought to expedite the appeal of the District Court's order, recognizing the advantage of an early resolution of this case.) More broadly, the international community and, in particular, representatives of the United States' allies in the war on terror are deeply concerned with the prompt resolution of the questions that have arisen about the legitimacy of the military commission system and its compliance with law. With deep questions currently being raised about the applicability of the Geneva Conventions to the war on terror, prompt and final resolution is necessary to avoid significant, pressing uncertainty on the world stage.

This Court must ultimately be the arbiter of those questions. Until there is a Supreme Court ruling on the legality of the military commission process, the legitimacy of that process will continue to be called into question, as will the perceived and actual commitment of the United States to the rule of law. In light of the extraordinary circumstances of this case, consideration of the pressing underlying domestic and international legal issues resulting in clarity of the law and consequent crystallization of the rights of the individuals affected, are necessary as a matter of urgency, and *amici* urge the Court to grant the Petition.

II. Any Further Delay In Resolving This Case Will Merely Compound Existing Violations Of International Law.

Amici also wish to point out that, by holding Mr Hamdan without trial for some three years, the United States has already contravened a fundamental principle of

international human rights law, namely that a person detained on suspicion of a criminal offence must be tried without delay, and that pre-trial detention should be exceptional and as short as possible.

The right to a speedy trial is enshrined in numerous instruments of international law, including the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 2, 1949, 6 U.S.T. 3114, T.I.A.S. 3362 (art. 103 of which provides that trial "shall take place as soon as possible", and that "in no circumstances" shall pre-trial confinement exceed three months), the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 ("ICCPR") (art. 9(3): "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release"), and the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 ("ACHR") (art. 7(5): "any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings"). The United States has ratified the Geneva Conventions and the ICCPR, and is therefore bound by their terms. Although the United States has not ratified the ACHR, it has signed it, and is therefore bound not to defeat its object and purpose (see Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 18), and must avoid taking any action that is inconsistent with the rights set out therein.

U.S. courts also recognise the right to a speedy trial, as protected by international law. In *Martinez* v. *City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998), citing the Restatement (Third) of the Foreign Relations Law of the United States and various international instruments,

including the ICCPR, the Court held that "there is a clear international prohibition against arbitrary arrest and detention", and that "detention is arbitrary 'if ...the person detained is not brought to trial within a reasonable time'." 141 F.3d at 1384; accord *Kadic* v. *Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995). Much shorter periods of pre-trial detention than Mr Hamdan has endured have been found to violate international law (see, e.g., *Sextus* v. *Trinidad and Tobago*, H.R.C. Communication No. 818/1998 of 16 July 2001, where a period of twenty-two months was held to violate ICCPR art. 9(3)). Detention for the period Mr Hamdan has endured falls outside any legitimate definition under international law of a "reasonable time", and unnecessary prolongation of this period will simply compound the unreasonableness, at Mr Hamdan's expense.

If this Court declines to take jurisdiction now, the United States will continue to detain Mr Hamdan throughout the time it takes for the case to proceed through the Court of Appeals (albeit on an expedited basis). Moreover, Mr Hamdan may be forced to endure further periods of indefinite detention if (as may be expected) this Court is ultimately asked to take jurisdiction on writ of certiorari following the United States' appeal. Every day of this continued detention is a further day's violation of Mr Hamdan's fundamental right to be tried for the crimes of which he is accused, sentenced if he is found guilty, and released if he is innocent.

In addition, the continued delay will inevitably affect the value of the evidence submitted at Mr Hamdan's trial when it eventually occurs, and may therefore prejudice the defence, for example where the judgment is based on statements by witnesses made many years after the relevant events occurred. *Cagas* v. *The Philippines*, H.R.C. Communication No. 788/1997 of 23 October 2001. Such prejudice is exacerbated where — as in Mr Hamdan's case

— the defendant's own mental state might be deteriorating as a result of prolonged solitary confinement, thus impairing his ability to assist in his own defence.

CONCLUSION

Every day this case remains unresolved is a further day of uncertainty not only for Mr Hamdan, but for the Respondents, the Government of the United States, and the wider international community that is watching and waiting to see how the methods established for trying detainees at Guantanamo will stand up to judicial scrutiny. The potential for delay and inconsistent judgments on matters as fundamental as the applicability and reach of the Geneva Conventions, particularly in an era when the application of those Conventions is being questioned by nation-states, militates strongly in favour of this Court resolving the matter now. Such a resolution is crucial not only for the future stability of the rule of law, but also for effective relations between nations. Accordingly, *amici* urge this Court to grant the Petition.

Respectfully submitted,

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